IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL

JURISDICGTION

SUIT NO. 4212 of 1996

1.M/s. Kanade Electronics,
a registered partnership firm, duly
registered under Indian Partnership Act,
1932 , having its office at 121/3972,
Nehru Nagar, Kuarla, (East)
Mumbai 400 024.

2.Shri Suresh Kande, (since deceased)
through :
A) Mr. Raviraj Suresh Kande,
aged about 28 years,

B) Mr. Pranay Suresh Kande,
aged about 20 years, being the
heirs and legal representatives
of the deceased plaintiffs no.3,
above named , residing at
121/3972, Nehru Nagar, Kurla
(East), Mumbai 400 024. ... Plaintiffs

vs.

1.Maharashtra State Financial
Corporation, a statutory Corporation,
established under the provisions
of State Financial Corporation
Act, 1951, having its office at
New Excelsior Building,
A. K. Nayak Marg, Fort,
Mumbai 400 001.

2.Tube Glass Containers,
having their office at Gupta
Compound, Off. Dr. C. Gidwani
Marg, Chembur, Mumbai 400 074. . . ...
Defendants

Mr. S. K. Mali for plaintiffs
Dr. Barthakur for defendants

CORAM: **A. S. AGUIAR J.**

Date: 17/3/2005

ORAL JUDGMENT:

1. The plaintiffs have filed this suit for a declaration that the plaintiffs are entitled to redeem mortgage dated 13.5.1986 in respect of the suit property , for restoration of the plaintiffs' possession of the said unit , for damages to the tune of Rs.33 lacs being loss of income, recurring interest liability on various loans and for damages caused to the plaintiffs by the wrongful action of defendant no.1. There is also a prayer that the in the event of the court confirming the sale defendant no.1 be directed to pay a sum of rs.15,45,000/- plus interest at the rate of 18% per annum from the date of the filing of the suit till realization. Although there are prayers for like appointment of Court Receiver and payment of maintenance charges, no proceedings were taken out for obtaining interim reliefs.

2. Briefly the case of the plaintiffs is that on the application of the plaintiffs MIDC allotted an industrial plot at Turbe, New Bombay to the plaintiffs on 15.9.1983 and on the plaintiffs' paying Rs.80,000/- towards the total consideration of Rs.1,20,000/- a lease agreement was executed on 27.11.1984 by MIDC in favour of the plaintiffs

no.1. After acquiring the plot the plaintiffs started their business of manufacturing electronic products .... in the name of the partnership firm M/s. Kanade Electronics, on small scale basis.

3. On 18.2.1989 the plaintiffs made an application to defendant no.1 for grant of term loan of Rs.9 lacs towards land, building and purchase of plant and machinery. The copy of the said application was forwarded to the State Bank of India, Vashi Turbe branch for grant of working capital loan. The Regional Manager of defendant no.1, by letter dated 13.7.1984 informed the plaintiffs that he had sanctioned a term loan of Rs.9 lacs. Thereafter the plaintiffs submitted plans to MIDC for approval and sanction through their architect. The plans were duly sanctioned on 12.4.1985 and approved by MIDC . In May 1985, the construction of the factory building commenced by obtaining bridge loan of Rs.3,50,000/- from Saraswat Cooperative Bank, Chembur Branch.

4. In the meanwhile the legal formalities for loan from MSFC were completed and accordingly on 13.5.1986 on executing the mortgage deed the 1st installment of Rs.2,37,000/- was made directly to the Saraswat Cooperative Bank, Chembur Branch.

5. It is the case of the plaintiffs that prior to the disbursement of the said installments plaintiffs by letter dated 2nd July 1986 applied to defendant no.1 for reallocation of the term loan already sanctioned but the defendant no.1 delayed taking any decision for reallocation of the loan. By letter dated 29.10.1986 defendant nos.1 informed the plaintiffs that they had considered their application for reallocation but insisted on the plaintiffs furnishing personal guarantee of one V.R. Rane who was the key technical adviser as guarantor for repayment of the loan with interest. The defendant no.1 further insisted on getting the mortgage modified by adding the name of said Rane as guarantor. Compliance of these formalities resulted in delay in disbursement of further loan installments. It is the case of the plaintiffs that the insistence of the defendant no.1, obtaining guarantee from said Rane who was in no way concerned with the firm, gave a handle to the said Rane to exploit his position in the day to day affairs of the firm, especially in the matter of purchase of machinery and materials from the dealers of his choice. He also started interfering with the staff, workers and insisted on appointment of partners of his choice and since the plaintiffs

did not comply with his illegal demands the said Rane started writing to defendant no.1, asking them to stop disbursement of any further loan amount and to relieve him as guarantor for repayment of the loan. It is the plaintiff's submission that the loans were sanctioned on the understanding that the said Rane would be rendering technical help. It is the case of the plaintiffs s that the loan was sanctioned on 13.7.1984 but there was a huge delay on the part of the defendants in disbursement of the loan amount due to interference from Mr. Rane. Though the said loan amount was sanctioned on 13.7.1984 the plaintiffs could not avail of the said loan facility during the moratorium period of 2 years and in these circumstances, it is contented, that the plaintiffs were entitled to extension of the moratorium period for a further period of one year but no such extension was granted by the defendants.

6. It is the case of the plaintiffs that on 16.6.1987 after completion of the factory building CIDCO issued occupation certificate, after which the machinery was installed in the factory premises and electric connection was obtained. Thereupon the plaintiffs by their letter dated 10th October 1987 informed the Regional Manager of defendant

no.1 of the progress made and requested them to disburse the remaining amounts to enable them to start production at the earliest. It is pointed out that immediately after completion of the factory building, plaintiffs started production in March 1988. During the period of first 6 months production was good. However, thereafter the production came to a stand still for reasons beyond the control of the plaintiffs.

7. On 27.3.1980 The plaintiffs applied for a working capital loan of Rs.12 lacs from the SBI Vashi Turbe Branch. The Bank on satisfying itself that the factory was running fairly well sanctioned the working capital of Rs.5 lacs. However, on account of some internal problems in the bank the loan amount towards working capital was not disbursed, and the factory of the plaintiffs came to a stand still, resulting in heavy loss to the plaintiffs.

8. On pursuing the matter with the Bank, the Bank agreed to disburse the working capital on condition of the plaintiffs creating a second charge on its assets in favour of defendant no.1 and also obtaining NOC from defendant no.1. However, despite getting the said guarantee the loan was not

disbursed. Subsequently by letter dated 7th March 1989 the Branch Manager of SBI informed the plaintiffs that cash credit facility to the extent of Rs.5 lacs has been sanctioned to the plaintiffs against hypothecation of stock in trade as primary security and creation of second charge over the assets financed by MSFC as collateral security. It is pointed out that SBI informed defendant no.1 that they may create a 2nd charge on the assets of the plaintiffs which had already been mortgaged to them. Although tripartite agreement between defendant no.1, SBI and MSFC was prepared the same was not executed as necessary formalities by way of NOC from MSFC was not granted and hence 2nd charge sought to be created on the assets did not become effective, and in view thereof, the credit facility of Rs.5 lacs promised by the SBI was not forthcoming. It is the case of the plaintiffs that non availability of this credit facility compounded the difficulties of the plaintiffs. On account of several other problems such as breakdown of power supply , repeated stoppage of work and due to financial strain the question of rehabilitation of the plaintiffs factory was under consideration. According to the plaintiffs, during the period August / October 1990 the unit was under observation for rehabilitation and this

was within the knowledge of the defendant no.1. The plaintiffs also informed defendant no.1 about the rehabilitation proposal. However, instead of granting the loan facility the corporation initiated steps issued notice under section 29 of the SFC Act recalling the entire loan amount. The plaintiffs by their letter dated 31st December 1990 requested the defendant no.1 to differ taking any action as threatened by the defendants. However, on 23rd January 1991 staff members of the recovery branch of Thane Region of defendant no.1 came and took over the factory premises pursuant to action under section 29 of SFC Act, despite the requests to defendant no.1 to reconsider their action.

9. It is the case of the plaintiffs that the action of the Corporation is arbitrary and mala fide and defendant no.1 was responsible for causing inordinate delay in disbursement of the term loan. There was considerable delay in disbursement of the 1st installment which was received two years later, depriving the plaintiffs the benefit of the moratorium period which would have been available to the plaintiffs. Defendant no.1 despite requests of the plaintiffs did not extent the moratorium , although there was delay on the part of the Corporation.

10. It is the contention of the plaintiffs that there was no delay on their part and no serious default has been committed by them in making the repayment of the outstanding dues and even though the plaintiffs were not making any profits they had made some payments. It is the plaintiffs' contention that defendant no.1 took possession of the plaintiffs unit on 23rd January 1991, even though the plaintiffs informed the defendants that they had various orders from their customers and work could not be carried out as the unit has been closed. The plaintiffs requested the defendants to withdraw the action taken and restore the possession of the unit to the plaintiffs. However, despite this defendant no.1 took further action in the matter and inserted advertisements in the local newspapers calling for tenders for purchase of the assets of the plaintiffs factory. It is further pointed out that on 11.3.1991 the plaintiffs gave a detailed programme for repayment of the outstanding loan amount to defendant no.1 and requested defendant no.1 to reconsider the action but the defendant no.1 paid no heed to the requests made by the plaintiffs.

11.The sum and substance of the plaintiffs case is

that the failure on the part of defendant no.1 in releasing the loan sanctioned and working capital in time to the plaintiffs so to keep the factory premises in operation , and to maintain the brake down tempo, the production came to a stand still. Further, that the abrupt action taken by the defendant no.1 to enforce the mortgage by issue of notice under section 29 of the Act and subsequent coercive measures by way of advertisement for sale of the property has resulted in the plaintiffs suffering damages for which they are required to be reimbursed and compensated.

12. Defendant no.1 has filed its written statement taking up several contentions, inter alia, that the suit is misconceived and not maintainable; that there is no cause of action against defendant no.s1, and that the reliefs claimed by the plaintiffs have become infructous. It is further pointed out by the defendants that the plaintiffs had filed four writ petitions challenging the action of the defendant no.1 in advertising and selling the property of the plaintiffs. All the writ petitions were dismissed in limine by this court with the observation to wit the plaintiffs were contumacious defaulters.

13.According to the defendants the plaintiffs were granted loan of Rs.9 lacs which was secured by the indenture of mortgage dated 30.5.1986. The loan was repayable by half yearly installment in 8 years along with interest, at the rate of 13.5% per annum. That out of the sanctioned loan the plaintiffs availed 7.68 lacs. The balance amount of Rs.1.32 lacs was not availed of by the plaintiffs and was therefore cancelled by the defendants.

14. It is the case of the defendants that since the plaintiffs committed default in repayment of the principal and interest and had closed down the production activities, the entire outstanding loan was recalled by the defendants and Notice under section 29 of the SFC Act was issued calling upon the plaintiffs to pay Rs.11,23,911/- which was due on 15.11.1990, together with interest and expenses. This action on the part of the defendants was challenged by the plaintiffs by filing writ petition No.1317 of 1991 which came to be dismissed on 18.3.1991. Another writ petition No. 2932 of 1993 was filed after the mortgage property was advertised for sale. The said writ petition also came to be rejected by order dated 17th September 1993. In response to the advertisement the unit came to be soled to defendant no.2 for

Rs.18.25 lacs on differed payment basis. The formalities of the same were completed on execution of the sale agreement dated 17.1.1992 by defendant no.1 in favour of purchaser defendant no.2. The 1st defendant received a sum of Rs. 18.25 lacs from the sale of the said assets to defendant no.2. The amount due from the plaintiffs was Rs.11,92,289/- as on 23.1.1991 and further interest from 16.11.1991 till payment and / or realization, totalling to Rs.15,23,063.60 which was appropriated by the defendants towards their dues, leaving a surplus of Rs.3,01,939.40. The defendant no.1 state they have not paid this surplus amount to the plaintiffs and the same is lying in escrow with them for being paid to the MIDC as per the tripartite agreement.

15. Thereafter, another writ petition was filed by plaintiffs being writ petition no. 556 of 1995 by which the plaintiffs called upon the defendant no.1 render proper accounts of the sale proceeds and statement of appropriation on the outstanding liability. However, the said writ petition was withdrawn and the plaintiffs filed another writ petition no. 3737 of 1996 for the same reliefs which also came to be dismissed by this court on 2nd August 1996. It is pointed out by defendant

no.1 that the State Bank of India has filed a suit being suit no. 236 of 1991 for recovery of the sum of Rs.2 crore from the plaintiffs on 11.4.1991 in respect of which the SBI claims having a second charge on the mortgaged assets of the plaintiffs. The State Bank of India is also aware that the surplus amount of Rs.3 lacs and odd has to be utilized for repayment to MIDC for the differential payment and SBI would be entitled for the balance sale proceeds in view of the second charge on the property.

16. It is the contention of the defendants that the sale by the defendant in favour of defendant no.2 was on differed payment basis and that the last installment was paid on 30th March 1989. The defendants state that they are ready and willing to give inspection of all the documents called for by the plaintiffs but the question of Court Receiver being appointed in respect of the unit does not arise and the plaintiffs' prayer for restraining the defendants from parting with possession of the said unit to third party, including defendant no.2, has become infractous since possession has already been given to defendant no.2 as far back as on 3rd February 1992.

17.The defendants deny that the action on their part under section 29 of the SFC Act is arbitrary or unwarranted as the action of taking over possession and selling the unit to defendant no.2 was after following due procedure and that at the time when the loan was recalled and notice under section 29 was issued the unit of the plaintiffs was closed. Hence the statement in para 19 of the plaint that on 23.1.1991 a team of staff members of the Regional Office of the defendants closed down the running unit of the plaintiffs arbitrarily, is false.

18. In the light of the pleadings the following issues were framed on 22nd April 2003:

1. Whether the suit as filed by the plaintiffs is maintainable?

2. Do defendants prove that the mortgaged property is sold by defendant no.1 to defendant no.2?

3. Do defendants further prove that in view of the sale of mortgaged property under section 29 of the State Financial Corporation Act the suit has become infructous?

4. Do plaintiffs prove that they are entitled to damages of rS.33 lacs or any

other amount as prayed for?

5. Do plaintiffs further prove that they are entitled to a sum of Rs.15.45 lacs., plus interest thereon from defendant no.1.?

6. Do plaintiffs prove that they are entitled to get Rs.3000/- per month from defendant no.2 and 3 by way of maintenance?

7. Are plaintiffs entitled for accounts?

8. What order and decree?

19. In support of its case the plaintiffs have examined plaintiffs no.2, partner of plaintiffs no.1 , while defendant no.1 has examined one Mr. B. Rao, the Deputy Manager of the 1st defendant Corporation. Defendant no.2 the auction purchasers are not before the court, though served, nor have they filed any written statement.

20. The suit as filed is basically for redemption of the mortgage dated 13/5/1986 on the basis of which the plaintiffs had obtained loan from the defendant no.1 Corporation. The other prayers are consequential to the main prayer. It is the case of the plaintiffs that the defendant no. 1 by invoking section 29 of the State Financial Corporation Act

1951 and taking steps pursuant thereto has effectively deprived the plaintiffs of their right to redeem the mortgage. The question that arises for consideration is whether the defendant no. 1 Corporation has acted illegally by resorting to the provisions of the said Act for recovery of the loans taken by the plaintiffs. It is an admitted position that the defendant no.1 had sanctioned a loan of Rs.9 lacs pursuant to the application made by the plaintiffs dated 18.2.1984 for the purpose of constructing the factory building and purchase of plant and machinery. It is also admitted position that the defendant no.1 disbursed a total amount of Rs.7.68 lacs out of the sanctioned loan of Rs.9 lacs. It is also admitted that the 1st installment of Rs.2.57 lacs was disbursed by defendant no.1 to the plaintiffs on 13.5.1986. According to the plaintiffs the factory commenced production in March 1988 and on the plaintiffs own showing the plaintiffs received Rs.7,68,000/- in five installments prior to the commencement of the production.

19. According to the plaintiffs on 27.3.1988 the plaintiffs had applied for a working capital loan of Rs.12 lacs from the State Bank of India , Turbe Branch and on finding that the factory had started

production in full swing the Bank sanctioned the working capital of Rs.5 lacs in the first phase. However, no disbursements were made from the sanctioned loan on account of the State Bank of India insisting on creating a second charge over the assets, financed by defendant no.1 and also obtaining a no objection certificate from MSFC. It is the contention of the plaintiffs that on account of the non disbursement of the working capital by the State Bank of India the production in the factory was abruptly disturbed. It is case of the plaintiffs that a proposal for rehabilitation of the plaintiffs' factory was under consideration and defendant no.1 was well aware of this proposal for rehabilitation and had correspondence with the plaintiffs for obtaining the working capital. However, despite this the Corporation started initiated action by issuing Notice under section 29 of the SFC Act, recalling their loan amount and proceeding to seal the factory. According to the plaintiffs this action on the part of the defendant no.1 led to all its woes resulting in sale of the factory and assets in alleged exercise of powers under section 29 of the SFC Act.

20. It is the contention of the plaintiffs that the decision of the defendant no.1 Corporation was

hasty, pre-mature and without giving an opportunity to the plaintiffs to take steps to repay the loan and to rehabilitate its factory by raising loan from the State Bank of India. The action therefore on the part of the defendant no.1 Corporation was wrongful resulting in severe prejudice and damage being caused to the plaintiff. It is the contention of the plaintiffs that he was entitled to have redeemed the mortgage but no sufficient opportunity was given to the plaintiffs by the Corporation and this action was high handed and wrongful, resulting in damage and production being caused to the plaintiff.

21. On the other hand it is the contention of the defendant no.1 Corporation that although the Corporation had sanctioned the loan of Rs.9 lacs and had in fact disbursed a total amount of rs.7.68 lacs to the plaintiffs pursuant to which the plaintiffs was in a position to construct the factory and commence production, the plaintiffs failed and neglected to repay the loan amount as per the schedule of repayment set out in the deed of mortgage. The entire loan amount of rs.9 lacs was to be repaid within a period of 7to 8 years, by 13 half yearly installments of Rs.70,000/- each.

22. Under the said mortgage the plaintiffs was also required to pay interest on the loan amount of Rs.9 lacs at the rate of 13.5% per annum payable in quarterly rests on 15th February , 15th May, 16th August and 15th November each year. The first of such installment therefore was to be made on 15th May 1986. It is pointed out that that the plaintiffs did not pay any installment towards the repayment of loan as per the schedule. Under these circumstances defendant no.1 issued notice under section 29 of the SFC Act recalling the entire loan amount of Rs.111,23, 911/- consisting of Rs.7,60,000 and interest calculated up to 30th September 1990 amounting to Rs.3,33,071 and expenses of Rs.22,840/-. The defendant further threatened that in the event of the plaintiffs failing to pay the said amount , the defendant would take over possession of the assets mortgaged to the Corporation in pursuance of the powers vested under the SFC Act. It is the contention of the defendant no.1 that despite the said notice the plaintiffs failed to repay the said amounts demanded by the said notice and in fact filed Writ Petition in this Court challenging the said notice under section 29 , which as stated herein above, was dismissed by this court. It is the further contention of the defendant no.1 that in these

circumstances , pursuant to the powers vested it it, further steps were taken and the possession of the property was taken over on 23/1/1991 under panchanama. Subsequently, the mortgaged property was advertised and sold , which as pointed out herein above was again challenged by the plaintiffs by filing a writ petition , which also came to be dismissed.

23.On the other hand it is the contention of the plaintiffs that it is not correct to say that he had not paid any amount to defendant no.1. In fact he had made quarterly payment of interest as mentioned in the mortgage deed up to 30th March 1989 amounting to Rs.1,28,639/-. It is further contented by the plaintiffs that on receipt of Notice under section 29 he had sent a reply to defendant no.1 being Exhibit P20, requesting defendant no.1 not to take any further action as the plaintiffs had approached the State Bank of India for loan for the purpose of rehabilitation of the plaintiffs company and sought time. However, the plaintiffs made no further attempt to pay any of the installments under the mortgage deed and in fact approached the court by way of writ petition challenging the said notice under section 29 of the SFC Act.

24.It is the contention of the plaintiffs that the action of the defendant no.1 in issuing the notice under section 29 of the Act and taking forcible possession is arbitrary and wrongful, as envisaged in the SFC Act. In support of their case the plaintiffs have relied upon the decision of the Supreme Court in the case of New Kenilworth Hotels (P) Ltd. vs. Ashoka Industries Ltd., and ors reported in (1995) 1 SCC 161 and Mahesh Chandra vs. Regional Manager, U.P. Financial Corporation & ors. (A.I.R. 1993 SC 935). In the case of New Kenilworth Hotels (P) Ltd. The Apex Court held as follows:

> " The limited right given to the Corporation under section 29 is to act as an owner to bring the properties of the defaulter to sale and not in derogation of the right under section 60. The fiction of law under section 29 does not have the effect of wiping out the statutory right of redemption under section 60 of the T.P. Act. Therefore , the right of the mortgagor still subsists and that thereby the mortgagor is entitled to exercise the right under section 60 of the T.P. Act.

25. Again in the case of Mahesh Chandra in para 13 the Apex Court observed as follows:

> “The Corporation has given statutory right to take over possession and management of the defaulting unit or hypothecate or both including the right to sell and realize the loan or advance due from the unit or debtor. The Corporation is an instrumentality of the State. The Corporation or its employees or officers are bound to act reasonably and fairly in dealing with the property of the debtor. The exercise of power or discretion in its dealing would be subject to the same constitutional or public law limitation as the Government. The Corporation also equally must conform its action with the same standard that meet the test of justness, fairness, reasonableness and relevance. In Kasturilal Laxmi Reddy v. State of J & K (1980) 3 SCR 1338: (AIR 180n SC 1992) this court held that when any Government's action fails to satisfy the test of reasonableness and public interest are found to be wanting in quality or reasonableness or lacking in

the quality of public interest , it would be liable to be struck down as invalid.”

26. In para 18 the Court held:

“The Corporation or its officers or servants as trustee are bound to exercise their power in good faith in selling or dealing with the property of the debtor as a ordinary prudent man would exercise in the management of his own affairs to preserve and protect his own estate. Therefore , the acts of the officer or servant of the Corporation should be reasonable , just and fair which must meet the eye and the offer accepted must be of competitive and every attempt should be made to secure as maximum price as possible to liquidate the liabilities incurred by the industrial concern or the debtor under the Act. “

15.In para 22 the Apex Court held:

“22. Keeping these various factors giving rise to conflicting interest the following directions are necessary to be issued to be observed by the Corporation while exercising power under s. 29:

Every endeavor should be made to make

the unit viable and be put in working condition. If it becomes unworkable:

(1) Sale of a unit should always be made by public auction.

(2)Valuation of a unit for purposes of determining adequacy of offer or for determining if bid offered was adequate, should always be intimated to the unit holder to enable him to file objection if any as he is vitally interested in getting the maximum price.

(3)If tenders are invited then the highest price on which tender is to be accepted must be intimated to the unit holder.

(4)(a) If unit holder is willing to offer the sale price,as the tenderer, then he should be offered same facility and unit should be transferred to him. And the arrears remaining thereafter should be rescheduled to be recovered in installments with interest after the payment of last installment fixed under the agreement entered into as a result of tendered amount.

(b) If he brings third parties with higher offer it would be tested and

may be accepted.

(5) Sale by private negotiation should be permitted only in very large concerns whee investment runs in a very huge amount for which ordinary buyer may not be available or the industry itself may be of such nature that by normal buyers may not be available. But before taking such steps there should be advertisements not only in daily newspapers but business magazines and papers.

(6) Request of the unit holder to release any part of the property on which the concern is not standing of which he is the owner should normally be granted on condition that sale proceeds shall be deposited in loan account. “

27. Is the contention of the plaintiffs that they were entitled to redeem the mortgage but on account of the haste and high handed premature action on the part of the defendant no.1 Corporation the plaintiffs' right to redeem the mortgage has been jeopardized, and in fact, by the subsequent sale and handing over of the property to the purchaser, the plaintiffs' right has been effectively taken

away by the defendants.

28. The reliefs claimed by the plaintiffs are for redemption of the mortgage and for the consequential relief of being put back in possession of the property and damages. The contention of the defendants is that the suit itself is not maintainable , as the property has already been sold and possession handed over. The prayers in the plaint have therefore become infructous. Moreover the plaintiffs have failed to ask for a declaration that the notice under section 29 and subsequent sale of the property to the purchaser are invalid and unless the same are set aside no consequential relief can be granted to the plaintiffs. It is further contended that the plaintiffs have agitated the points taken up by him in the suit before this court in the writ petitions filed by him all of which came to be dismissed and therefore on the principles of res judicata and / or constructive res judicata the suit is not maintainable. Further, the reliefs for damages and payment of money are time barred , being filed after lapse of more than 4 years. It is also submitted that the reliefs being for recovery money, having become time barred, and there being no plea in the plaint making out any basis for

payment of damages, the plaintiffs claim in the suit is not maintainable.

29.The first question that arises for consideration is whether the defendant no.1's actions under section 29 and subsequent action under the provisions of the SFC Act are wrongful or lawful , as per the provisions of the Act? Section 29 of the Act clearly empowers, such action by the Corporation. The plaintiffs admittedly received Rs.7.61 lacs out of the sanctioned loan of Rs.9 lacs. This amount was received in five installments and it was after receipt of this money that the plaintiffs were able to purchase the land, building and machinery afor the factory and to start production. The plaintiffs factory was running in full swing for the first 6 months. The 1st installment for repayment of the loan became due on 20th May 1988, i.e. after the moratorium period of 2 years. However, despite having started production which was in full swing the plaintiffs made no attempt to repay any installment towards the loan taken by the plaintiffs. On the other hand it is pertinent to note that the defendant no.1 did not rush and immediately send the notice under section 29 of the Act but did so only on 31.12.1990, more than 2 years after the

installments became due and payable. Even after receipt of the notice under section 29 the plaintiffs made no attempt to pay any installments but only asked defendant no.1 to bear with them and to give them some more time. Despite the defendant no.1 staying its hands, the plaintiffs made no attempt to pay even a single installment. Defendant no.1 has however, admitted that the plaintiffs made payments of the interest as per the schedule to the mortgage deed upto 30th march 1989. But again thereafter the plaintiffs failed to pay even the interest installments. When the notice under section 29 of the Act was issued there was an amount of Rs,.3,33,071 outstanding by way of interest. What is more, instead of making efforts to pay the installments towards the principal the plaintiffs rather chose to approach this court to quash the notice under section 29 by filing writ petition being Writ Petition No. 1317 of 1991 which came to be dismissed, with the plaintiffs being labeled a contumacious defaulter in repayment of the loan amount. It is also to be noted that the offer made by this court to the plaintiffs to atleast pay half the amount outstanding was not accepted by the plaintiffs and the court was constrained to pass the order of dismissal of the petition. Even the subsequent

writ petition filed by the plaintiffs challenging the sale inf favour of defendant no. 2 was dismissed by order dated 17.9.1993 as the court found no reason to exercise any discretion in favour of the the plaintiffs on the facts and circumstances of the case.

30. The challenge to the notice under section 29 and to the subsequent sale of the property in favour of defendant no.2 are issues which have been agitated by the plaintiffs, heard and decided upon by this court , in the writ petition, as stated above. If the same issue is again framed and agitated, in this suit, the same will be hit by the principles of res judicata and / or constructive res judicata. The plaintiffs had filed in all four writ petitions including writ petition No.556 of 1985 which was withdrawn, writ petition no. 3907 of 1986 for rendering accounts and for handing over possession, which was dismissed as withdrawn. Thus the issues now sought to be raised are issues which have been heard and decided upon and/ or deemed to be heard and decided upon and therefore a rehearing of the same issues would be barred by res judicata or principles of res judicata and / or constructive res judicata.

31. Learned advocate for the defendants in support of his contention that the suit is barred by res judicata and constructive res judicata has relied upon the judgment of the Apex Court in the case of In Daryao vs. State of U.P. , reported in AIR 1961 SC 1457, wherein P. B. Gajendragadkar , J. (as he then was), speaking for the Constitution Bench held as follows:

> “(19) We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed, the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appealed or other appropriate proceedings permissible under the Constitution.... If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for th reason that the petitioner was guilty of

latches, or that he had an alternative remedy, it would not be a bar, except in cases which we have already indicated....” .

32. Reference is also made to the case of Pujaribai v. Madan Gopal, reported in (1989) 3 SCC 433 wherein the Supreme Court held as follows:

“24. It thus becomes clear that when a writ petition after contest is disposed of on merits by a speaking order, the question decided in that petition would operate as res judicata , but not a dismissal in limine or dismissal on the ground of latches or availability of alternative remedy...”.

33. Reference is also made to the case of Rajendrakumar v. Kalyan (Dead) by L. R.S. Reported in (2000) 8 SCC 99 wherein the Apex Court observed as follows:

“The doctrine of res judicata has received a statutory sanction in the Court as a matter of prudence and to give due weightage to a finding or a decision so as to reach finality in the matter of a dispute between the same parties or litigating under the same parties. The doctrine thus, is to

achieve finality of dispute between the parties being a principle of prudence so as to give efficacy to a finding of the Court rather than permit the parties to go to trial more or less on the same issues over again and thus introducing a possibility of conflict of views. Judicial verdict has its special sanctity and cannot be the subject matte of discussion at any future time, involving identical or similar issues. The facts in issue is one (sic)where more than one attempt has been made to establish a fact and in every attempt that particular fact stands negated.

15. In the present context, the issue is placed before the Apex Court, and as such therefore, should have to be considered in its proper perspective so that similar issues are not raised before the Court for adjudication on occasions more than once since it has a salutary effect on the jurisprudential system of the country."

33.The facts of the present case clearly discloses

that the issue in the present case whether the plaintiffs have a right to redeem the mortgage in the facts and circumstances of the case has been agitated before and decided upon by this court in two writ petitions. In writ petition no. 1317 of 1991 the plaintiffs had challenged the action under section 29 of the SFC Act and asked for a writ of mandamus directing the 1st defendant herein to restore possession of the suit property and also asked restraining the 1st defendant from taking any further action to sell the suit property. The Division Bench of this court was pleased to dismiss the said writ petition holding that the plaintiffs were contumacious defaulters in repayment of the loan amount, and that the plaintiffs miserably failed to abide by the schedule of repayment and in fact not a single installment was made by the plaintiffs. Thus the question of legality of the possession of the suit property with defendant no.1 has been agitated and decided upon in the said writ petition.

34. The subsequent action of the defendants in selling the property was also challenged vide writ petition no. 2932 of 1993 which was also dismissed by the Division Bench holding that the suit property was taken over for non-payment of dues way back on 23.1.1991. Thus the court's finding in

both the writ petitions amount to adjudication of the same issue raised by the plaintiffs in the present suit. The orders in both the writ petitions were speaking orders which disposed of the petitions on merits and therefore, the decisions in the said petitions are binding upon the plaintiffs and bar the plaintiffs from instituting another suit on the basis of the same issues as having been already adjudicatad upon in the writ proceedings and therefore hit by the principles of res judicata and / or constructive res judicata. Thus issue no.1 is answered in the negative. The suit is not maintainable and is barred by res judicata or the principles of res judicata and / or constructive res judicata.

35. Since the validity of the defendant no.1's action in issuing the Notice under section 29 of the SFC Act and the subsequent action under the said Act have been decided upon by the Division Bench of this court in the above said writ petitions the challenge to th sale is rendered infractuous. Pursuant to the action taken under section 29 the defendant no.1 has handed over possession of the suit property to defendant no.2 under a registered deed of assignment which has been registered on 14.11.2002 and defendant no.2

has been put in possession of the suit property. The said questions therefore, cannot now be re-agitated in the present suit. Hence issue no.2 has to be answered in the affirmative.

36.On the question of claim for damages to the tune of Rs.33 lacs for the wrongful action on the part of the defendants since the action of the defendants under the Act have been upheld the same cannot be said to be wrongful and therefore the question of the defendants paying any damages to the plaintiffs does not arise. In view thereof issue no.4 is answered in the negatived.

37.Similarly issue no.5 is also answered in the negative as the action of the defendants have been upheld in both the writ petitions.

38.Issue nos. 6 and 7 also have to be answered in the negative as the question of paying any maintenance or rendering any accounts to the plaintiffs does not arise in view of the finding of this court as to the legality of the sale and action under the provisions of the said Act has been held to be valid.

39.The plaintiffs have alleged mala fides on the

part of the defendant Corporation in taking action under section 29 and other provisions of the SFC Act and has relied upon the judgment in the case of Mahesh Chandra (supra) wherein the Supreme Court has laid down the guidelines for taking action under section 29, as set out herein above. The plaintiffs allege that these guidelines have been flouted by the defendants. However, the writ court has found the action of the defendant no.1, to be in consonance with the procedure laid down under section 29 and other provisions of SFC Act and therefore defendant no.1 cannot be said to have flouted the guidelines. It must be pointed out that the decision in the case of Mahesh Chandra (supra) is no longer good law as the same has been overruled by the Supreme Court in the case of Haryaa Financial Corporation and anr. Vs. Jagdamba Oil Mills and anr. , reported in (2002) 3 S.C.C. 496, wherein the court observed as follows:

> "6. The Corporation is an instrumentality of the State deals with public money. There can be no doubt that the approach has to be public oriented. It can operate effectively if there is regular realization of the installments. While the Corporation is expected

to act fairly in the a matter of disbursement of the loans, there is corresponding duty cast upon the borrowers to repay the installments in time, unless prevented by insurmountable difficulties. Regular payment is the rule and non-payment due to extenuating circumstances is the exception. If the repayments re not received as per the scheduled time frame, it will disturb the equilibrium of the financial arrangements of the Corporations. They do not have at their disposal unlimited funds. They have to cater to the needs of the intended borrowers with the available finance. Non-payment of the installment by a defaulter may stand in the way of a deserving borrower getting financial assistance.

40. Further in para 15 of the said decision it is observed as follows:

> “15. The view in Mahesh Chandra case appears to have been too widely expressed without taking note of the ground

realities and the intended objects of the statute. If the guidelines as indicated are to be strictly followed, it would be giving premium to a dishonest borrower. It would not further the interest of any Corporation and consequently of the industrial undertakings intending to avail financial assistance. It would only provide an unwarranted opportunity to the defaulter (in most cases chronic and deliberate) to stall recovery proceedings. It is not to be understood that in every case the Corporations shall take recourse to action under section 29. Procedure to be followed, needless to say, has to be observed. If any reason is indicated or cause shown for the default, the same has to be considered in its proper perspective and a conscious decision has to be taken as to whether action of disposal of seized unit have to be worked out. The view expressed in Gem Cap case appears to be more in line with the legislative intent. Indulgence shown to chronic defaulter would amount to flogging a dead horse without any conceivable result being expected. As the facts in the present

> case show, not even a minimal portion of the principal amount has been repaid. That is a factor which which should not have been lost sight of by the courts below. It is one thing to assist the borrower who has intention to repay, but is prevented by insurmountable difficulties in meeting the commitments. That has to be established by adducing material. In the case at hand factual aspects have not been dealt with, and solely relying on the decision in Mahesh Chandra case the matter has been decided."

41. The plaintiffs have failed to make out any case for obtaining indulgence from the courts and hence the reliefs prayed for cannot be granted. However, there is one aspect of the matter which is required to be dealt with viz., the amount that remains surplus after the suit property has been sold and the sale proceeds applied to the satisfaction of the defendants claim. The defendant no.1 have in their written statement in para 11 admitted that they received the sum of Rs.18.25 lacs. The amount due to to defendant no.1 as on 15.11.1990 together with interest and expenses was Rs.11,23,911/- with further interest from 16.11.90 till payment or realization. The sale

proceeds was appropriated as follows:

Principal	..	Rs.7,68,000.00
Interest	...	Rs.5,96,997.00
Expenses	....	Rs.1,58,066.60
Total	...	Rs.15,23,063.60
Surplus	....	Rs.3,01,936.40

42. Thus an amount of Rs.3,01,936.40 is available from the sale proceeds of the suit property to the credit of the plaintiffs. Although the plaintiffs have not made any prayer for the the return of the surplus amount, either in the main prayer or in the alternative learned advocate for the plaintiffs in their oral submissions have submitted that the surplus amount must be paid over to the plaintiffs. However, it is the stand of the defendant no.1 that this excess amount cannot be paid to the plaintiffs as under clause 6 of the mortgage deed dated 13th May 1986 between the plaintiffs and the 1st defendant there is a reference to general agreement dated 4th September 1984 between MIDC and the 1st defendant which requires consent of MIDC for the purpose of mortgaging or assigning their leasehold interest in the land which has been allotted by MIDC. It is further pointed out that clause 3 of the said agreement dated 4th September 1984 is binding on the plaintiffs in view of

clause 6 of the mortgage deed dated 13th May 1986 which states that in the event 1st defendant sells the demised premises the 1st defendant shall pay to the MIDC the entire amount of unearned income from the sale proceeds. In view thereof defendant no.1 claims to be entitled to retain the excess sale proceeds after adjusting the amount due to the 1st defendant and in the event if there is any excess left , after making the payment to MIDC in terms of clause (c) of the said agreement the same may be handed over to the borrower. It is the contention of the defendant no.1 that they are entitled to recover expenses incurred by defendant no1., subsequent to the sale of the said unit, on litigation initiated by the plaintiffs as per the expenses account maintained by the 1st defendant in respect of the suit property. Taking the said expenses into account, surplus of Rs.3,01,936.40 has been wiped out as on 31.3.1998 and at present in fact there is debit balance of Rs.1,34,450/- which will have to be recovered from the plaintiffs.

43.Admittedly there is a balance from the sale proceeds amounting to Rs.3,01,596.40. Admittedly defendant no.1 had requested MIDC in writing for making payment of the excess amount in terms of

clause (3) of the agreement. However, MIDC has not informed the defendant of the amounts due and payable to them under clause 3 of the said agreement dated 4th September 1984. The surplus of the sale proceeds in the hands of defendant no.1 are according to section 29 of the SFC Act, required to be handed over to the defaulter after deduction of costs, charges and expenses properly incurred and incidental to action under section 29. Defendant no.1 has not offered to return this excess amount to the plaintiffs and is now seeking to recover the costs, charges and expenses of the litigation subsequent to the action under section 29. Defendant no.1 cannot hold on the said surplus amount under the pretext of paying the same to MIDC because MIDC has not made any such demand despite written intimation allegedly given by defendant no.1 to MIDC. Nor can defendant no.1 appropriate this surplus amount towards the alleged expenses incurred by it in fighting the litigation initiated by the plaintiff. Defendant no.1 have their remedy in law for recovery of the said costs and expenses but they cannot exercise any lien or power of appropriation in respect of the money which prima facie is the money of the plaintiffs being the surplus of the sale proceeds. The surplus amount has been deposited in court

pursuant to order of this court dated 20th January 1997 (Variava J). in Notice of Motion No. 3027 of 1986 in the above suit. Defendant no.1 was directed to deposit in this court a sum of Rs.5,19,011.72 being the surplus amount of Rs.3,01,936.40 along with interest at the rate of 13.5% per annum from 17.1.1992 to 13.5.1997. This amount being the money of the plaintiffs the plaintiffs are at liberty to withdraw the same together with accrued thereon.

44. With above order suit stands dismissed and disposed of, with no order as to costs.

(A. S. Aguiar J.)

-x-